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DEP takes public comments on revised Environmental Justice Policy

The Pennsylvania Department of Environmental Protection on March 12 shared an updated draft of its Environmental Justice (EJ) Policy for public comment. Among the many changes, the draft EJ Policy expands the role of the Office of Environmental Justice (OEJ), creates new requirements for unconventional oil and gas, and creates new enforcement priorities for the department. Comments were accepted through May 11.

Pennsylvania's Environmental Justice Policy

The OEJ oversees environmental justice initiatives and policies in the state. The primary goal of the OEJ is to increase communities' environmental awareness and involvement in DEP's permitting process. In 2004, the department created the Environmental Justice Public Participation Policy to provide citizens in environmental justice communities enhanced public participation opportunities during certain permit application processes. The EJ Policy is a critical part of DEP's environmental justice initiatives, providing guidelines for the agency's approach to public engagement for permit application reviews in environmental justice areas as defined under the current EJ Policy.

In 2018, DEP circulated a draft revision to the current EJ Policy for public comment. Ultimately, the department withdrew the proposed draft revisions after public comments were received, and the current 2004 version of the EJ Policy remained in

effect. DEP continued to evaluate revisions to the EJ Policy and in 2021 proposed to update the policy by incorporating, refining and expanding upon the withdrawn 2018 revisions. On March 12, DEP released the draft EJ Policy for a 60-day public comment period with several public meetings and informational webinars.

Significant revisions and additions to the draft EJ Policy

The draft EJ Policy proposes to make significant changes to the current policy. Below are some of the most significant changes recommended by DEP:

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1. Incorporation of executive order on EJ

The draft EJ Policy cites and incorporates the requirements Governor Tom Wolf's Executive Order on Environmental Justice (Executive Order 2021-07), which was issued in October 2021 and formally established the OEJ. This contextualizes the draft EJ Policy into the broader effort to address environmental justice across the state executive agencies and federal EJ initiatives. The draft EJ Policy has been altered throughout to ensure OEJ will meet the requirements of the order.

2. OEJ expanded roles and responsibilities

The draft EJ Policy describes the purpose and responsibilities of the OEJ. The draft policy gives DEP new roles and responsibilities and dictates how OEJ will engage with stakeholders and communities going forward. This marks a large expansion of the responsibilities of the OEJ, including coordinating an interagency council on environmental justice for the Commonwealth. By way of example, OEJ will provide training to DEP staff, maintain and reassess every two years the EJ Area Viewer, issue an annual report, develop strategic plans every five years, and help create and implement a Language Access Plan for the department.

3. DEP maintains broad discretion on opt-in permits

While listed trigger permits automatically trigger the application of the current policy, DEP maintains the adverse cumulative environmental or public health stressors” shall be denied a permit. The New Jersey EJ law does not define “cumulative environmental or public health stressors.”

Without a definition of “cumulative impacts” in the draft EJ Policy, or under Executive Order 2021-07, it is unclear whether DEP will interpret that phrase similar to the New Jersey law. However, the department’s broad discretion under a subjective standard (“warrant special consideration”) and an undefined cumulative impacts standard make the applicability of the opt-in permit process hard to predict.

4. Updated definitions of “EJ Area” and “Area of Concern”

Under the current EJ Policy, an EJ Area was defined as census tract with 30 percent or greater minority population or 20 percent or greater population below the poverty line. The draft policy defines an EJ Area as “the geographic location where Department’s EJ Policy applies.” Further, it states that the methods for identifying EJ Areas will be specific outside the policy for easier amendment. Because the definition of an EJ Area will live outside the policy, it will be more frequently amended to reflect recent data and definitions used in other agencies and community groups. Thus, the draft EJ Policy’s application and scope are not clearly defined or entirely predictable.

The draft EJ Policy simplifies the current definition of Area of Concern, which now is defined as the area within a half-mile of the proposed permit activity. The draft directs applicants to use the new EJ Area Viewer mapping tool to determine if a project is in an EJ Area and the project’s Area of Concern.

5. Unconventional oil and gas now included

Oil and gas unconventional well permits (and change in use) are now considered trigger permits and the draft EJ Policy includes new, specific provisions for unconventional oil and gas public engagement. Under the draft policy these permits will automatically trigger the policy requirements. Unconventional well permits are included in the draft EJ Policy’s list of trigger permits, at Appendix A. While permits listed in Appendix A trigger Sections II (“Permit Review Process”) and III (“Community Input”) of the draft EJ Policy, unconventional well permits will only trigger the application of Section IV (“Oil and Gas Public Engagement”). The draft policy’s Section IV proposes unique public participation requirements

for unconventional oil and gas operations. The requirements of Section IV will apply retroactively to unconventional well permits already issued by DEP and create continuing obligations such as annual reports on active and anticipated drilling operations—even though such operations are not subject to an actual permit application submitted to the department.

6. EJ Areas Viewer mapping tool

The draft policy requires the use of the new EJ Areas Viewer, which is available at pa.gov/EJViewer. The EJ Areas Viewer is an interactive mapping tool that contains environmental and demographic indicators, which can be updated and modified by DEP at any time based on new environmental justice related data. Along with other mapping tools, the department should use the EJ Areas Viewer to assist in decisions regarding all aspects of environmental justice, including determining if a potential opt-in permit should fall under the draft EJ Policy. Overall, the use of this and other mapping tools will allow DEP and OEJ to consider much more data—environmental, demographic, health, etc.—than under the existing policy.

7. Climate initiatives

New requirements will push OEJ and DEP to harmonize the environmental justice initiatives with climate change initiatives. This focus will cut across the department—programs, rulemaking, policies and enforcement. DEP commits in the draft policy to ensure climate-related initiatives will consider and prioritize communities disproportionately impacted by climate change. The department also will ensure the Climate Action Plan addresses environmental justice and the impact of climate change on EJ Areas. Further, DEP will implement strategies for outreach and engagement with environmental justice and climate change vulnerable communities.

Babst Calland will be tracking the draft EJ Policy as the department responds to comments and moves to finalize the policy this year. If you have questions about the environmental justice developments described above, please contact Sean McGovern at 412-394-5439 or smcgovern@babstcalland.com.